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In the

Supreme Court of the United States

OCTOBER TERM 1959

No. ~~552 Miscellaneous~~ #40

HAROLD D. ROGERS
Petitioner

vs.

MARK S. RICHMOND, WARDEN
Respondent

On Petition For a Writ of Certiorari To the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Dated February 3, 1960

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OPINIONS BELOW

The citations of the opinions of the lower courts are adequately set forth in the Petition and Appendix thereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Did The Court of Appeals err in holding that the powers of the District Court on Habeas Corpus should not be enlarged to permit the rejection of the historical facts as found by the state trier, in the absence of special circumstances?

2. Did The Court of Appeals err in holding that the facts and circumstances surrounding petitioner's confessions were not such as to render them involuntary, and inadmissible at his trial?

STATEMENT OF THE CASE

On the evening of November 21, 1953, Dorothy Kennedy was shot and killed by petitioner Harold Rogers in her husband's liquor store. Earlier that day petitioner, having decided to procure money by means of robbery, stole a revolver and cartridges from the home of his nephew. He loaded the gun, consumed some liquor and drove to decedent's store. On entering, he asked for a half-pint of liquor and thereupon produced his gun and announced his purpose to commit robbery. As decedent ran to the telephone, petitioner struck her on the head with the butt end of the gun. He then fired five shots at deceased, causing her immediate death. Petitioner then removed the contents of the cash register and drove off.

In the meantime Rogers' nephew, having discovered the loss of his gun sought out petitioner and charged him with taking the gun. Petitioner steadfastly denied stealing it whereupon both men went to police headquarters and reported that the gun had been stolen by persons unknown. Thereafter petitioner filed off the serial numbers of the gun to conceal its identity.

On January 9, 1954, petitioner was arrested on charges of Attempted Robbery, Breaking and Entering and Theft, committed that day at the Travelers Hotel. As the officers made the arrest, they observed Rogers hide a gun under the seat of his automobile. On being questioned he gave a signed statement to the police claiming that he had just won the gun in a "crap game" that afternoon, but in a statement the following day admitted stealing it from his nephew's home (A. 286).

On January 13, 1954, petitioner was presented in the City Court of New Haven on the Travelers Hotel charges and was bound

over to the April Session of the Superior Court and in default of bail was lodged in the County Jail.

On the morning of January 30, 1954, ballistics tests conducted by the State Police established that the bullets recovered from the Kennedy murder scene were fired by the gun found in petitioner's possession. Thereupon, at about 1 P. M. on the same day, petitioner was brought to the office of the State's Attorney for questioning. Detectives started to question him at about 2 P. M. (A. 195). At all times during the questioning Rogers was seated in a comfortable armchair (A. 42). During the afternoon he was invited to eat and did eat and have coffee with the detectives; and later in the evening he was again invited to eat but chose merely to take coffee (A. 34). He smoked his own cigarettes and those of the officers. When he first expressed a desire to smoke, one handcuff was released and thereafter one hand remained free (A. 42).

Petitioner makes no claim that physicial violence or threats of physical violence were used against him and acknowledges that at no time did the questioning by the police confuse him (A. 33).

At 8 P. M. Captain Eagan of the New Haven Police Department, came in to question Rogers. Eagan, who was acquainted with Rogers from a prior arrest, told Rogers that he did not have to say anything (A. 28) and that he could not promise him any benefit or reward (A. 385). During the course of the interrogation, Eagan informed Rogers that Mrs. Rogers would have to be questioned in order to ascertain whether he had said anything to her about the murder and he assured Rogers that during her questioning the two state wards who were then living with them would be taken care of at the Children's Center (A. 199, 316). At about 9 P. M. Eagan made a pretended call on a dead wire to hold a car and policewoman in readiness to bring Mrs. Rogers down for questioning. During the next hour Rogers was not questioned at all (A. 243). At about 10:30 P. M. Rogers

said he had been drinking that night (A. 200) and then proceeded to confess that he had shot and killed Mrs. Kennedy. Thereupon a court reporter was summoned and Rogers gave his confession while the reporter recorded it stenographically (A. 325). The confession consisted of thirty typewritten pages. At the outset Rogers related, largely in narrative form (A. 325-326), an elaborately fabricated and detailed story of (1) a six months adulterous relationship between the decedent and himself; and (2) a claim of provocation for the murder based upon profane and abusive remarks by the decedent to him just before the shooting. Throughout his confession Rogers answered questions freely and without hesitancy. On its completion shortly after 12 P. M. Rogers made oath to its truth.

The next day some seventeen hours later, Rogers gave a second confession to the coroner at his official inquest (A. 347-369). At the outset, the coroner fully informed Rogers of his right to counsel and his right to remain silent (A. 347-348). Rogers acknowledged his awareness of his rights and expressly declined the services of counsel.

Rogers was forty-eight years old, highly intelligent (A. 319), and the brother of a New Haven police officer. He had been arrested and interrogated by police on at least four occasions prior to the questioning on January 30th; the first time being in connection with a New York offense, the second after his arrest for violation of parole, the third for a liquor offense in 1949 in New Haven, the fourth his arrest on January 9th for the Travelers Hotel robbery (A. 195-196).

State Court Proceedings

On March 2, 1954, the Grand Jury returned an indictment charging Rogers with murder in the first degree in the perpetration of a robbery. Rogers was represented by counsel at all stages of the proceedings since.

During the course of his trial to the jury petitioner invoked his right to the so-called "orthodox" rule for testing the admissibility of confessions. Accordingly, the court excused the jury and heard evidence at great length as to the circumstances surrounding his confession to the police. At this preliminary hearing, Rogers testified and called witnesses in his own behalf, and the court excluded questions concerning the truth or falsity of the confession. The trial judge made thirty-seven express findings of fact (A. 314-317), including the specific finding that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney." Upon the conclusion of this preliminary hearing and after arguments by counsel, the court ruled that the confession was freely and voluntarily made. After this finding of voluntariness by the court, the jury in the course of the trial considered the same facts, claims and circumstances surrounding the making of the confession in determining its weight and credibility. A similar hearing in the absence of the jury was had upon the second confession to the coroner. Upon testimony produced at this hearing, the court specifically found that (1) "the accused did not ask to be represented by counsel" and (2) "the accused voluntarily chose to testify after hearing from the coroner that he was entitled to counsel and that anything he said might be used against him" (A. 319). The court concluded that this second confession also was voluntary.

There was substantial evidence other than the confession connecting Rogers with the murder, notably the ballistics evidence, possession of the murder weapon on the night of the murder (A. 56), his false report to the police that the gun had been stolen by persons unknown (A. 286); his possession of the murder gun at the time of his arrest (A. 196), his contradictory statements, first claiming that he won the gun in a "crap" game and afterwards admitting that he had in fact stolen it on the day of the murder (A. 285, 286). In defense, Rogers presented witnesses for the purpose of mitigating the penalty (A. 312), but offered

no evidence to controvert the truth of his confession of this murder (A. 317). The jury returned a verdict of guilty of murder in the first degree.

On appeal, the Supreme Court of Errors considered the circumstances surrounding the confessions and held that they were freely and voluntarily given and affirmed the conviction (A. 219) (O'SULLIVAN, J., dissenting). The ensuing petition for certiorari was denied by the Supreme Court of the United States.

FEDERAL PROCEEDINGS IN HABEAS CORPUS

Petitioner thereupon instituted this habeas corpus proceeding in the federal court below. Judge SMITH of the District Court made no examination of the state record or of the factual findings therein contained (A. 388), but instead conducted a hearing *de novo* for the purpose of making his own findings of historical fact. At that hearing Rogers testified that Captain Eagan had informed him that "I didn't have to say nothing to him" (A. 28); and three police officers testified that Rogers had made no request for counsel at any time during his interrogation (A. 41; 58, 66), thereby reinforcing the record testimony of Captain Eagan. Judge SMITH chose to disbelieve petitioner's acknowledgment that he was told of his right to remain silent (A. 176), but on the issue of request for counsel he chose to believe the accused and to repudiate the testimony of the four officers of the law (including Captain Eagan whom he had never seen) (A. 176) on the theory that the officers' recollection would naturally "coincide with the version they must subconsciously prefer" (B. 20). Judge SMITH thereupon ordered the sentences vacated (A. 176-180).

On respondent's motion for rehearing and to amend the findings, Judge SMITH refused to receive or consider the state trial record or the factual findings of the trial judge on the admissibility

of the confession and denied the motion for rehearing (A. 194-196).

On appeal, the Court of Appeals vacated the judgment of the District Court on the ground that Judge SMITH had failed "to call for and consider the trial record or so much thereof as related to the admissibility of the confessions" (B. 6); and on remand it directed that "Unless the judge below shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of *Brown* vs. *Allen*, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the state trial court. *Brown* vs. *Allen*, at pages 507-8." (B. 7).

In clarification of its opinion, the Court of Appeals on petition for rehearing pointed out that this limitation to the historical facts as found by the state court would not preclude the District Court from hearing additional "evidence material on the constitutional issue which the state court had excluded or as to which it had made no finding" (B. 8), even though no vital flaw is found in the state proceedings.

Petitioner's request to this Court for certiorari was denied per curiam with a short opinion. 357 U. S. 220.

On remand to the District Court, the respondent moved to disqualify Judge SMITH which motion was denied (B. 9).

The District Court thereupon received the entire transcript of the state proceedings (Record on Appeal, 1043-1714), the findings made by the state trial court (A. 314-320), the transcript of the preliminary hearing on the issue of the voluntariness of the confessions (Record of Appeal, 967-1041), the state court appellate record (A. 278-324) and Rogers' two confessions (A. 325-369).

With the complete record thus before him, Judge SMITH acknowledged that "the issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge" (B. 22) and that he could not find "any lack of fair hearing or procedural due process, or other basis for this court in its judicial discretion to consider evidence outside the state court record" (B. 20). Accordingly, he used the historical facts as found by the state court as the basis for his consideration of the constitutional issues and thereupon concluded that the writ should be discharged (B. 22). Petitioner thereafter moved for additional findings, which motion was denied by Judge SMITH (B. 33).

On appeal, the Court of Appeals affirmed, in an opinion by Judge MOORE in which Judge SWAN joined, with CLARK, C. J. dissenting (AP. 1-32). The Court held that the procedure adopted by Judge SMITH on remand was in full accord with *Brown* vs. *Allen* and with this Court's per curiam opinion (AP. 5), and found, after reviewing all of the circumstances, that neither confession was the product of coercion (AP. 11).

ARGUMENT

I

THE DECISION OF THE COURTS BELOW IS CORRECT

1. THE POWERS OF THE DISTRICT COURT ON HABEAS CORPUS SHOULD NOT BE ENLARGED TO PERMIT THE REJECTION OF THE HISTORICAL FACTS AS FOUND BY THE STATE TRIER, IN THE ABSENCE OF SPECIAL CIRCUMSTANCES.

On remand, Judge SMITH proceeded for the first time to examine the full state trial record. This record included not only the findings of the court as to the admissibility of the confessions and the transcript of the preliminary hearings thereon, but also the petitioner's claims in opposition to the admission of the con-

fessions, the petitioner's claims of proof and requests to charge as well as the testimony presented by the State and the defense, together with the confessions themselves (A. 314-320, Record on Appeal 967-1041, A. 278-324, A. 325-369, Record on Appeal 1043-1714).

Judge SMITH's objective was to determine "whether that record shows any lack of fair hearing or procedural due process or other basis for this Court in its judicial discretion to consider evidence outside the state court record" (B. 20). He recognized that "whether we call it a vital flaw or unusual circumstances, or a substantial ground for exercise of judicial discretion in granting a hearing, *something* must appear upon examination of the state court record to require a trial *de novo* of the fact issues" (B. 18). (Emphasis added.) He knew that he was privileged to "take additional testimony not considered by the state trial court on constitutional issues;" but that he might "not substitute his judgment on factual issues fully tried," where no vital flaw exists.

From his examination of the record, Judge SMITH found no unfairness or lack of due process and no circumstances warranting rejection of the historical facts as specifically found by the state trier (B. 20-22). Accordingly, he proceeded to make his own independent evaluation of these facts, and upon these facts based his constitutional determination that petitioner's rights were not violated.

Notwithstanding Judge SMITH's finding that "the issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge" (B. 22), petitioner contends that he should have made "a fresh federal inquiry into the underlying facts" (Petition p. 25). Petitioner asserts that even though Judge SMITH concluded that "there was no unfairness or lack of due process" in the state court's consideration of Rogers' credibility

(B. 20), he should have conducted a retrial to redetermine credibility.

In short, petitioner claims that the writ of habeas corpus vests a federal court with unbounded and unbridled discretion to hold a trial *de novo* of the factual issues; that a federal judge may at will and without legal standards to guide or govern him, repudiate basic historical facts acknowledged by him to have been fairly found by the state tribunal.

If petitioner's position were to prevail, full hearings and the remaking of historical facts would be required in all cases, even where, as here, the federal judge avers that the facts have been fairly found and nothing appears to warrant such a retrial. Judge CLARK, contrary to all his previous utterances, seems to adopt this view that the federal court should be permitted to remake the historical facts on the ground that the ensuing product would be superior to the state's factual findings (AP. 23).

The rule contended for by the petitioner would overturn *Brown* vs. *Allen* and all the host of cases that have consistently held that the constitutional issue must be determined on the historical facts found in the state record. Petitioner's proposal would repeatedly present the situation posed by the Court of Appeals:

> "Is a convicted state prisoner, having been unsuccessful before a jury of his peers or a judge, to be able via habeas corpus to have his case re-tried by some federal judge in the district of his incarceration and, if so, is the federal judge to have the right to re-determine the historical facts? . . . Take a single case. It is tried and appealed twice in a state court, certiorari is denied. Three, four or ten years later, a federal judge or appellate court takes a different view and decides to believe witness A instead of witnesses B and C as to coercion. Would it not have been better to have had the case tried originally before a federal judge so that the time and expense of the state proceedings could have been avoided?" (AP. 4-5).

To avoid such a chaotic condition, respondent respectfully submits that *some* standard, *some* test should be applied by a federal court before it rehears facts *de novo*. The procedure carefully formulated by Judge SMITH gives due recognition to the proper balance of federal-state relationships and yet protects the constitutional rights of the petitioner. His decision reveals that he fully understood that it was his duty *independently* to determine whether the petitioner's conviction may constitutionally stand and that the state court's findings, if fairly made, must serve only as the basis for the consideration of the constitutional issues (B. 19, 20). And on the other hand, if the subordinate findings of fact by the state trier were unfair or lacking in due process, he was free to order a hearing *de novo*. Thus, having first determined that the state trier fairly and conscientiously arrived at the factual findings, Judge SMITH properly exercised his own independent determination on the ultimate constitutional issue, by affirming the state trier's conclusion that the confessions were not coerced. *Thomas* vs. *Arizona*, 356 U. S. 390 (1958); *Brown* vs. *Allen*, *supra* at 504; *Palakiko* vs. *Harper*, 209 F. 2d 75, 80 (1953), *cert. denied* 347 U. S. 596.

Brown vs. *Allen* clearly supports the procedure adopted by Judge SMITH as affirmed by the majority opinion below. Both opinions in *Brown* vs. *Allen* (Mr. Justice REED and Mr. Justice FRANKFURTER) stress that the resolution of the historical facts differs from the determination of the federal constitutional issue. If the state record does not contain the basic or historical facts, the federal judge may hold a hearing *de novo* to ascertain them before determining the constitutional issue. On the other hand, if the state record specifically sets forth all the necessary historical facts, the federal judge should use these facts to make an independent evaluation of the federal constitutional issue.

> "In some cases the State court has held a hearing and rendered a decision based on specific findings of fact; there may have been review by a higher State court which had

before it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases."

Brown vs. *Allen, supra* at 504.

"On review here of state convictions, all those matters which are usually determined issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple."

Watts vs. *Indiana*, 338 U. S. 49, 50-51 (1949).

As set forth in *Gallegos* vs. *Nebraska*, 342 U. S. 55 (1951), the federal courts have the duty to make the ultimate determination as to the voluntary character of the confession but "we give deference to the (state's) conclusions on disputed and essential issues of what actually happened." See, also, *Thomas* vs. *Arizona, supra*; *United States* vs. *Murphy*, 2 Cir. 1955, 222 F. 2d 698, 706; *United States* vs. *Jackson*, 2 Cir., 1958, 256 F. 2d 7.

This is not to say, however, that even if the state record contains specific findings of historical facts, the federal judge may never hold a hearing *de novo*. Judge SMITH recognized that "if important evidence exists which the state trial court did not have before it, grounds would exist for exercise of discretion to retry the factual issues" (B. 19). Judge SMITH concluded that there was no need here to invoke this "additional evidence rule." To the rule requiring "vital flaw" or unusual circumstances, Judge SMITH gave a broad interpretation, adopting as his criterion:

"Whether we call it a vital flaw or unusual circumstances, or a substantial ground for exercise of judicial discretion in granting a hearing, something must appear upon examination of the state court record to require a trial *de novo* of the fact issues." (B. 18).

That such a standard is required is amply supported in the law. In *United States ex rel. Smith* vs. *Baldi*, 344 U. S. 561 at 569, this Court, in rejecting petitioner's contention that a plenary hearing should have been held, reaffirmed the principles of *Brown* vs. *Allen*, as follows:

> "Not unless special circumstances prevail, should the lowest federal court reverse the highest state court in cases where the constitutional issues have been disposed of on the merits by the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the state court and the allegations in the petition for the writ before the federal court fail to disclose that the state in its prosecution departed from the constitutional requirements . . .
>
> "This review of the proceedings accords with our holding in *Brown* case."
>
> "Nor has any territorial, state or federal court permitted habeas corpus to relitigate and redetermine issues already litigated to final appellate determination. To do so would cause litigation in criminal cases to be interminable and bring confusion into the administration of justice. A defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies . . . and then supersede those remedies on collateral attack by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them."
>
> *Palakiko* vs. *Harper, supra* at 80.

The respondent respectfully submits that Judge SMITH's decision as affirmed by the Court of Appeals establishes a well-defined and proper procedure for the lower federal court to follow when presented with a writ of habeas corpus.

2. THIS COURT'S PER CURIAM OPINION ON DENIAL OF CERTIORARI SANCTIONS THE PROCEDURE ADOPTED BY THE COURTS BELOW.

In denying certiorari, this Court stated:

> "We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* vs. *Allen*, 344 U. S. 443, 506 et seq." (B. 9).

Judge CLARK and the petitioner claim that Judge SMITH's interpretation of this Court's opinion reduces the federal constitutional review of coerced confessions to an illusion (AP. 23). However, Judge SMITH in fact gave to this Court's opinion the broadest possible scope and by no means set for himself the limitations claimed by Judge CLARK and the petitioner. Judge SMITH expressly states that this Court's opinion "makes it plain" that a federal judge, after review of the state record, may decide to take testimony *"even though no vital flaw is necessarily found."* (B. 18) (emphasis added). His opinion is abundantly clear that he did not consider a finding of "vital flaw" an indispensable prerequisite to a *de novo* hearing. He was however firmly of the opinion that he must adopt some standard to govern the exercise of his discretion to conduct a retrial (B. 18). Accordingly he proceeded to formulate what appears to be a most liberal standard, prescribing that whether it be labelled "vital flaw" or "unusual circumstance" or "substantial ground for exercise of judicial discretion" or "some other basis," there must be "something" to justify a hearing *de novo*. The majority of the Court of Appeals recognized the liberal test employed by Judge SMITH on remand:

> "Judge SMITH's own understanding of the broad scope of his power and review upon the remand is vital to a proper determination of this appeal. He did not regard

himself as foreclosed from exercising his independent judgment or as in the role of a rubber stamp upon state court conclusions. To him 'the question here is whether on review of the full trial court record (which he had not had before him when he delivered his previous opinion), testimony should be considered in a trial *de novo*.' He knew that he was privileged to 'take additional testimony not considered by the state trial court on constitutional issues, such as lack of due process by the use of coerced confessions, and make an independent determination of the facts, such as the voluntary character of confessions, and (that he) must independently determine whether the conviction may constitutionally stand' but that he might 'not substitute his judgment on factual issues fairly tried (i.e. where no vital flaw exists) before a state court on similar evidence.'" (AP. 3).

Under these broad standards Judge SMITH examined the state record and concluded therefrom that the issues as found by the state trier were in full accord with due process of law, and that there were no "circumstances" which would warrant the exercise of his discretion to make new factual findings (B. 20, 21). Accordingly, using the historical facts as fairly found by the trial court, Judge SMITH determined that there was no denial of constitutional rights (B. 22).

3. THE COURTS BELOW WERE JUSTIFIED IN ACCEPTING THE STATE COURT'S FINDING THAT ROGERS DID NOT REQUEST COUNSEL.

Judge SMITH specifically cites this issue as having been "fully and conscientiously tried by an experienced judge" (B. 22). The finding was based upon the trier's unassailable right to observe the witnesses and to pass judgment on their credibility. Rogers testified that he made a request for counsel to Eagan during the evening as well as to another detective in the afternoon. In direct contradiction, Eagan testified that Rogers made no

request for counsel during the evening (A. 233) and that the other officers[1] did not report any such request having been made in the afternoon (A. 237). Under these circumstances, Rogers' testimony cannot possibly be put into the category of an undisputed fact, as petitioner strives to do.[2] The trial court disbelieved Rogers and credited the testimony of Captain Eagan. Thus, the finding has adequate support in the evidence and is properly inclusive of the entire period of questioning.

In his attack on this particular finding, petitioner makes much of the fact that it was filed five months after trial (Petitioner's Brief, pp. 29-30). True, the formal finding was filed in conformity with prescribed appellate procedure, but obviously the *fact* was found by the court directly after hearing the conflicting testimony of Rogers and Eagan on this point. It cannot seriously be contended that this finding, "fully and conscientiously tried by an experienced judge" (B. 22), does not truly represent his conclusion from the evidence produced at the time of trial.

Nor is there any basis for petitioner's statement that this finding "was apparently disbelieved by the State Appellate Court" (Petitioner's Brief, p. 4). Petitioner has merely grasped words out of context and thereby distorted the true meaning of the majority opinion.

---

[1]It should be noted that at the hearing held by Judge SMITH these three officers testified that Rogers in fact made no request for counsel at any time during the afternoon (A. 41, 58, 66). Captain Eagan did not appear as a witness before Judge SMITH.

[2]Moreover, under Connecticut law, "A fact is not undisputed merely because one or more witnesses testified to it and no one denied it, for the trial court may not give credence to the witnesses and that is for it to determine."

Maltbie, *Appellate Procedure*, 2nd Ed. 1957, Sec. 158
Corvo vs. *Waterbury*, 141 Conn. 719, 724 (1954).
Clark vs. *Haggard*, 141 Conn. 668, 674 (1954).

4. The Courts Below Were Justified in Concluding that Petitioner's Constitutional Rights Were Not Violated by the Use of His Confessions at the Trial.

The test of voluntariness is "whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime." *Lyons* vs. *Oklahoma*, 322 U. S. 596, 602. Applying this test to the circumstances here it cannot be said that the courts below erred in determining that the confessions were voluntary.

Certainly, Rogers' removal from jail without a court order could have no coercive effect, since he was unaware of it. The questioning was not of such length or character as to be coercive. As pointed out by the Court of Appeals, "Rogers was not an indicted defendant but a suspect who was being questioned in the course of an unsolved crime."[3] Aside from his extensive prior police experience,[4] he acknowledges an explicit reminder by Eagan of his right to say nothing (A. 28, A. 358). His wife was a legitimate subject of police inquiry.[5] The claim now so glibly made, that she was "crippled" was not asserted by counsel at the trial for the obvious reason that the judge observing her in court each day, could see for himself that she was in no way disabled.[6]

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[3]*Crooker* vs. *California*, 357 U. S. 433, *Cecenia* vs. *Lagay*, 357 U. S. 504; *In re Groban's Petition*, 352 U. S. 330.

[4]This experience stems from his four prior arrests. That he was in no awe of police officers, is demonstrated by his brashness in going to the police on the day following the murder and falsely reporting his nephew's gun stolen by persons unknown.

[5]See *Stein* vs. *New York*, *supra* 184, *Voght* vs. *United States*, 5 Cir., 156 F. 2d 308, 312, *Hawkins* vs. *United States*, D. C. Cir., 158 F. 2d 652, 653-654; *cert. den.* 331 U. S. 830.

[6]Moreover, in testifying at the trial for the purpose of mitigating the penalty, Mrs. Rogers made no claim of being crippled. (Testimony of Mrs. Rogers, Record on Appeal.)

Faced with this fact, defense counsel wisely chose not to include this "threat" in the "two grounds" which they specified against the admission of the confession into evidence (A. 303).

All of the surrounding facts and circumstances in this case impel the conclusion that the primary underlying cause for Rogers' confession was not solicitude for his wife but his realization of the formidable evidence of his guilt already in the hands of the police and his desire to put the best possible face on the crime which he could no longer deny. His thirty page confession was not an abject capitulation. His statements were not supine attempts to give desired responses to leading questions but were the considered product of his mental processes in his effort to serve best his own self-interest.

The second confession was made to the coroner some sixteen or seventeen hours after the police questioning had ceased and after the coroner advised Rogers of his rights to counsel and to remain silent. Rogers acknowledged that he understood his rights (A. 40), and readily repeated his confession.

A review of the facts of the leading cases of this Court clearly reveal that the circumstances surrounding the petitioner's confessions, either singly or in combination, fall far short of rendering his confessions invalid. See, *Lisinba* vs. *California*, 314 U. S. 219 (1941); *Stroble* vs. *California*, 343 U. S. 181 (1952); *Gallegos* vs. *Nebraska, supra; Palakiko* vs. *Harper, supra; Stein* vs. *New York, supra.*

II

THERE IS NO CONFLICT IN DECISIONS

Judge CLARK cites a list of authorities to justify his statement that a federal court may "make its own revaluation of the basic facts" (AP. 23). But respondent has never disputed the power of the federal court to "revalue" historical facts in order inde-

pendently to determine the constitutional issues. Our concern is with the "remaking" of facts fairly found by the state court. The cases cited by Judge CLARK and petitioner clearly support our contention that, in the absence of special circumstances, a federal court may not "remake" the historical facts.

In *Leyra* vs. *Denno*, 347 U. S. 556, this Court at page 558 states "The question for our decision is therefore whether the present confessions were so coerced . . . We therefore *examine the circumstances as shown by the undisputed facts* of this case." (emphasis added)

In *Payne* vs. *Arkansas*, 356 U. S. 560 at 562, this Court again stressed that a state court's findings of fact if fairly made upon substantial and conflicting testimony, as to the circumstances surrounding the contested confession "are not this Court's concern." (In the present case, Judge SMITH specifically found that the state trier's findings of historical facts were fairly and conscientiously made by an experienced judge (B. 22).

It was solely in the light of the historical facts in the record that this Court made its review of the constitutional issues in *Fikes* vs. *Alabama*, 352 U. S. 191.

In *U. S. ex rel. Corbo* vs. *LaVallee*, 2 Cir., 270 F. 2d 513. (CLARK, C. J., being one of the presiding judges), the Court considered only the "undisputed evidence" and "undisputed facts" in determining the constitutional issues.

In *U. S. ex rel. Sileo* vs. *Martin*, 2 Cir., 269 F. 2d 586, SMITH, J., writing for an unanimous Court, specifically employed the "unusual circumstances" or "vital flaw" test, before ordering the lower federal court to hold a hearing *de novo*. The "vital flaw", in this case arose from the lack of specific findings of historical facts.

In *U. S. ex rel. Wade* vs. *Jackson*, 2 Cir., 256 F. 2d 7, *cert. denied* 357 U. S. 908 (CLARK, C. J., sitting on the panel), the

Court expressly states at page 13 that "'it is not our province" to pass on credibility of police witnesses but that the function of the federal court is "to make (its) own independent examination of the record to determine whether on the basis of the undisputed facts there is any merit to the claim," 256 F. 2d at page 9. (In the case at bar, Judge SMITH, after searching the state record and finding no reason not to accept the state trier's historical facts, made his independent determination of the constitutional issue upon those facts, precisely as sanctioned by Judge CLARK in the *Wade* case.)

In *U. S. ex rel. Savini* vs. *Jackson*, 250 F. 2d 349, 351, and *U. S. ex rel. Alvarez* vs. *Murphy*, 2 Cir., 246 F. 2d 871, 265 F. 2d 497, the Court of Appeals examined the record in the light of the undisputed facts.

Similarly, in *U. S. ex rel. Caminito* vs. *Murphy*, 222 F. 2d 698, *cert. denied* 350 U. S. 896 (CLARK, C. J., sitting on the panel), the Court of Appeals expressly determined the constitutional issue on the undisputed facts and ignored all parts of relator's testimony which were disputed by police officers and, therefore, made no attempt to retry the credibility of witnesses. Chief Judge CLARK, in his concurring opinion, stated that:

> ". . . I doubt the utility for dignified or effective law enforcement of review and overturn by a federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals" and ". . . I can respect the views of the state judges as rationally developed, even though I must disagree."
>
> 222 F. 2d at 706.

Throughout these proceedings, the petitioner has placed great reliance on *Cranor* vs. *Gonzalez*, 9 Cir., 226 F. 2d 83. The Court of Appeals, in its first opinion, held that this reliance "is misplaced," *Rogers* vs. *Richmond*, 252 F. 2d at 810, and points out the "obvious" distinction between *Cranor* where "there was no

express finding as to the voluntariness of the confession in the state court," and the instant case where the trial judge in conformity with (the 'orthodox') rule held a hearing before trial, made express findings, and concluded that the confessions were each voluntary," 252 F. 2d at 810.

Thus in *Cranor*, in the absence of a record which it might consult the Court actually had no alternative but to exercise its discretion to ascertain the facts for itself. This lack of facts in itself was tantamount to a "vital flaw," 252 F. 2d at 810.

CONCLUSION

The respondent respectfully prays that this Court deny certiorari and allow the decision of the Court of Appeals to stand.

Respectfully submitted,

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